judge did not give sufficient consideration to the evidence adduced by the appellant and that the appellant had discharged the onus that is on him. There is no substance in the complaints of the appellant. The evidence of the appellant is highly contradictory and improbable. The appellant cannot have discharged the onus that is on him when his testimony is full of improbabilities.

On the second charge it is submitted on behalf of the appellant that the gold becomes prohibited goods only when an attempt is made to import it into Singapore and consequently the appellant is only guilty of this charge if he is guilty of the first charge i.e. guilty of importing. As my view is that the appellant is correctly convicted on the first charge I need not go into this submission. Suffice it to say that in my view there is no substance in this submission.

The appellant also appeals against the sentence. On the first charge the appellant was sentenced to six months imprisonment and ordered to pay a fine of $10,000 in default thereof to serve one year's imprisonment. On the second charge he was ordered to pay a fine of $5,000, in default thereof to serve 3 years imprisonment.

The value of the 165 gold bars, weighing 617.8 troy ounces, was about $83,878 on the 9th May, 1968. The gold merchant who was called to give evidence said that he could not give the value of the 134 pieces of gold coins weighing 41.2 troy ounces since it was controlled gold.

The sentence that can be imposed on the first charge is "for a first offence with a fine not exceeding $10,000 or three times the value of the goods in respect of which such offence was committed (whichever may be the greater) or with imprisonment of either description for a term not exceeding twelve months or with both."

The penalty for the second offence is a fine not exceeding $5,000.

It is submitted that the sentences imposed by the district judge are manifestly excessive.

It can hardly be said that in the circumstances of this case, the sentences are manifestly excessive. If the district judge erred at all he erred in favour of the appellant on the first charge. This type of offence is easy to commit but extremely difficult to detect. The gold was so ingeniously concealed that the customs officers took two hours to discover it. I agree with the district judge when he said that the sentence in this case should be a deterrent one.

However, the district judge has erred when he directed that the appellant suffer imprisonment of one year in default of payment of the fine of $10,000 on the first charge.

Unlike the Customs Ordinance, there is no express provision relating to imprisonment for non-payment of fine in the Control of Imports & Exports Ordinance. Therefore the provisions of section 267 of the Criminal Procedure Code are applicable and by section 267 (c) (i) the maximum term of imprisonment the court can direct the appellant to suffer in default of payment of the fine of $10,000 is six months.

Although by section 105 of the Customs Ordinance, 1960, the court has the power to impose three years imprisonment in default of payment of a fine of $5,000 nevertheless that section provides that the period of imprisonment imposed "shall be such period as in the opinion of the court will satisfy the justice of the case". I am of the view that, considering that the first charge is a more serious charge and taking into consideration that if the fine on the first charge is not paid the total period of imprisonment the appellant would have to suffer would be one year, a period of one year's imprisonment on the 2nd charge would satisfy the justice of this case.

In the result the appeal against conviction and sentence is dismissed. The terms of imprisonment the appellant is to suffer in default of payment of the fine of $10,000 on the first charge and the fine of $5,000 on the second charge are varied to one of six months on the first charge and one year on the second charge.

Appeal dismissed.

Solicitors: *J. B. Jeyaretnam & Co.*

ABANG v. SARIPAH

[A.C.J. (R.T.H. Lee J., William Hardin & Anyau anak Bakit, Assessors) November 6, 1969]

[Sibu — Native Court of Appeal, Civil Appeal No. 1 of 1969]

Native Customary Law — Temuda Land — Dayak removing to another district — Loss of rights in land — Native Customary Laws Ordinance (Sarawak, Cap. 51).

Land Laws — Temuda Land — Dayak removing to another district — Loss of rights in land.

In this case the appellant and the respondent claimed a piece of temuda land. The land in question was originally occupied by the respondent but she had moved out of the land to Sibu district more than 20 years ago. The appellant alleged that the land had been sold to him by the brother-in-law of the respondent. The Resident's Native Court, on appeal, held that as the respondent had moved to another district, she had lost her rights to the land. Further she had no power to alienate it. The land in dispute must therefore be declared as "tanah orang pindah" and left for the benefit of the people in the area.

Held, dismissing the appeal: (1) the Resident's Native Court was correct in its decision that the respondent had by removing to another district lost her rights to the land and that she had no right or power to alienate it;

(2) upon the facts in this case neither the appellant nor the respondent has any claim to the land under customary rights.

Cases referred to:-

(1) *Udin anak Lampon* v. *Tuai Rumah Utom* [1949] S.C.R. 3.

(2) *Nyalong* v. *The Superintendent of Lands & Surveys, 2nd Division, Simanggang* [1967] 2 M.L.J. 249.

(3) *Sumbang anak Sekam* v. *Engkarong anak Ajah* [1958] S.C.R. 95.

CIVIL APPEAL.

Parties not represented.

Cur. Adv. Vult.

B.T.H. Lee J.: This was an action brought by the respondent in respect of a piece of *temuda* land (i.e. customary land) situate at Sungei Bemban, Pati Sg. Mador, Binatang.

The facts are fully set out in the case stated and for the purposes of the case stated under the Native Courts Ordinance (Sarawak Cap. 43) require only brief mention.

The land in question was originally occupied by Saripah anak Unting, the respondent, an Iban woman who for sometime felled the jungle. She then moved out of the land to Sibu district more than 20 years ago. She claimed the land belongs to her.

In the meantime the appellant, also an Iban, alleged that the land was sold to him by Layan, brother-in-law of the respondent, sometime ago. He also claimed that the land belonged to his parents.

Unfortunately, the parties are not represented here nor in the lower courts, so we have not had the assistance of arguments from both sides.

At the trial by the Native Officer's Court, Binatang on October 12, 1967 where it was first heard, the court dismissed the respondent's claim on the ground that *temuda* was sold to the appellant.

From this decision the respondent appealed to the District Native Court which on 5th January, 1968 upheld the lower court's decision.

Subsequently, on an appeal by the respondent the Resident's Native Court made the following finding: —

"According to our inspection of the land on the spot that the disputed land is a 'paya' and little portion hill land planted with young rubber. From the position of the longhouse of respondent which is away from another longhouse of Rh. Muling where the disputed land is about half a mile, it is clear that there is reason for appeal in this case.

On the other hand, appellant has moved to another district and therefore has lost her right of the land. Alternatively, if as recorded that her brother-in-law had sold the land to respondent or his parents, this then is contravening the Iban Tusun Tunggu of Third Division. Respondent has no right to receive 'sua' or 'tasih temuda' from anybody. This is the opinion of this appellate court which led to the dispute of ownership. In view of the above findings the appeal is allowed and the decision of the lower court is set aside. The land in dispute is therefore declared as 'tanah orang pindah' and is left there for the benefit of the people in the area, to be more definite and clear for the benefit of those who have not enough farming land in the nearby longhouse, that is Rh. Muling and possibly another nearby longhouse."

An appeal was lodged by the appellant and the Resident's Native Court stated a case for the opinion of this court in accordance with section 8(3) of the Native Courts Ordinance (Sarawak Cap. 43).

The law is quite clear as to the question raised and was laid down as long ago as 1949 by the Supreme Court at Sibu and was merely declaratory of the existing law (as to which I shall deal later).

I would quote a passage from the judgment of Hedges C.J. in *Udin anak Lampon* v. *Tuai Rumah Utom*.[1] His Lordship said: —

"In so far as the appellant bases his claim upon the rights formerly enjoyed by one Juing, we are agreed that these rights were extinguished long ago when Juing moved to Binatang.

By an order dated 10th August, 1899, the Rajah declared that any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district, nor may he prevent others farming thereon, unless he holds such land under a grant. That order was declaratory of the customary law, and although the order itself is no longer on the Statute Book the force of the customary law is in no way diminished."

The law on this subject was recently considered in somewhat similar circumstances by Silke J. in *Nyalong* v. *The Superintendent of Lands & Surveys, 2nd Division, Simanggang*.[2] Silke J. merely reiterated what was said by Hedges C.J. in *Udin anak Lampon* v. *Tuai Rumah Utom* already quoted.

I desire to say however that having regard to the law which will be referred to in a moment, the last sentence of the learned judge i.e. "That order was declaratory of the customary law, and although the order itself is no longer on the Statute Book the force of the customary law is in no way diminished" is not altogether correct.

The provision of the law in the Statute Book has apparently been overlooked hitherto, in more quarters than one.

Equally explicit is the observation of Lascelles J. in the case of *Sumbang anak Sekam* v. *Engkarong anak Ajah*[3] at page 96:

"Individual customary rights are not transferable by sale or otherwise for value."

Again at page 97 Lascelles J. said: —

"The opinion of the court regarding the third point is that if the holder of customary farming rights moves from a particular longhouse but remains within the same Penghulu's jurisdiction he continues to retain in full such farming rights provided his move does not take him beyond what can only be described as 'reasonable farming distance' from the land."

I do not find it necessary to discuss the point at great length. The law is to be found in the following passage from *Native Customary Laws Ordinance (Cap. 51) Vol. VII Sarawak Laws Appendix 'A'* para. 7 at page 636.

"Theoretically all untitled land whether jungle or cleared for padi farming (temuda) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farms confers on them a restricted right of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes 'temuda'. It is a recognised custom that 'temuda' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance. In former days there were no restrictions on anyone felling jungle provided that he did not destroy valuable commercial trees such as gutta, jelutong and engkabang. But it is not so now. Since the introduction of the Forest and Erosion Ordinance no one is allowed to fell jungle without permission from the proper authority.

No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they did so, and they may be prosecuted in view of the fact that selling of untitled land is prevalent in this division, and Dayaks seem to forget this custom.

There are no other ways in which Dayaks can part with possession of untitled land other than by gift or on death. When a Dayak abandons his land 'temuda' and moves to another district he loses all his rights to it. The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit

of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the right.

This was made clear by the Rajah's order dated 10th August, 1899 Land Tenure Act, which states that, 'Any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district nor may he prevent others farming thereon unless he holds such land under grant'."

There is therefore no doubt whatsoever upon the facts that neither the appellant nor the respondent has any claim to the land held under customary rights.

On the view we take there really was no evidence at all either in the lower courts or in this court capable of supporting the respondent's claim.

We have come to the conclusion that the issue presented to this court is straightforward. We can find no reason for upsetting the Resident Native Court's decision. Indeed so far as the authorities go, the court came to a right decision in point of law. In the result we think the finding of that court was right.

It is the unanimous opinion of the court that this appeal must be dismissed and the court orders that it be dismissed accordingly.

William Hardin and **Anyau anak Bakit**, Assessors, concurred.

Appeal dismissed.

LIM HENG SOON & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Wee Chong Jin C.J. (Singapore), Tan Ah Tan F.J. & Chua J.) November 14, 1969]

[Singapore — Federal Court Criminal Appeal No. Y.14 of 1968]

Penal Code, s. 302 read with s. 34 — Weapon of offence not marked as exhibit — Weapon handed to jury after they had retired to find their verdict — Misdirection.

Criminal Law and Procedure — Weapon of offence — Introduction in evidence — Not marked as exhibit — Whether introduction of fresh evidence — Whether irregularity resulting in miscarriage of justice.

The appellants were convicted on a joint charge of the murder of a detective in the Singapore Police Force on the night of February 5, 1968. They appealed to the Federal Court and it was contended on appeal that the convictions should be set aside because the bearing scraper which was alleged to have been used as the weapon of offence was not marked as an exhibit though it was handed to the jury after they had retired to find their verdict. Further there was no proper direction on common intention and the judge misdirected the jury on this.

Held, dismissing the appeal: (1) the handing over to the jury after they had retired of the bearing scraper which was introduced in evidence (but not marked as an exhibit) at the trial did not amount to the introduction of fresh evidence at the trial after jury had retired to consider their verdict;

(2) the trial judge directed the jury on common intention in accordance with the law laid down by the Privy Council in *Mahbub Shah* v. *King-Emperor*(4) and accordingly it cannot be said that he failed to direct the jury adequately.

Cases referred to:-

(1) *Yeo Ah Seng* v. *Public Prosecutor* [1967] 1 M.L.J. 231.

(2) *R.* v. *Stoddart* (1909), 2 Cr. App. R. 217 at p. 246.

(3) *Abrath* v. *North Eastern Railway* (1883), 11 Q.B.D. 400 at p. 453.

(4) *Mahbub* v. *King-Emperor* L.R. 72 I.A. 148.

FEDERAL COURT.

David Marshall for the 1st appellant.

Syed Esa Almenoar for the 2nd appellant.

K. S. Rajah (Ag. Senior State Counsel) (*Isaac Paul Retnam*, Deputy Public Prosecutor, with him) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal by the appellants against their convictions on a joint charge of murder. They were charged as follows: —

"That you, Lim Heng Soon @ Ah Soon and Low Ngah Ngah @ Low May Koon @ Ngah Ngah on or about the 5th day of February, 1968, at about 11.20 p.m. at Bukit Timah Road, 6th milestone, Singapore, together with one other person unknown, in furtherance of the common intention of all of you committed murder by causing the death of one Munusamy s/o Doresamy, and thereby committed an offence punishable under section 302 read with section 34 of the said Code (Chapter 119)".

The deceased Munusamy was a detective in the Singapore Police Force. On the night of 5th February 1968 he was seen by a friend, Kuppusamy, arresting an unknown male Chinese at a lane off Annamalai Avenue and then leading his captive along Annamalai Avenue towards Bukit Timah Road. The deceased was next seen by another friend, Krishnan, talking with a male Chinese beside a public telephone booth near the junction of Annamalai Avenue and Bukit Timah Road. Krishnan was at the rooftop of a foodstall which was a few feet away from the telephone booth and was repairing the roof. Krishnan overheard the male Chinese asking the deceased to let him go as he had done nothing. Krishnan moved to a position on the roof nearer the telephone booth and squatted facing away from Bukit Timah Road and in the direction of a five-foot way which runs off Annamalai Avenue and parallel to Bukit Timah Road.

While in that position he saw three other male Chinese walking together along the five-foot way from the direction of Annamalai Avenue. They rushed across a foot-bridge towards where the deceased was standing with his captive and one of them knocked against the deceased enabling the captive to run away. The three Chinese then took positions, one behind the deceased, one on his right and one on his left and the deceased was held by two of them. He was then stabbed by the two who were beside him and fell down with the upper portion of his person lying on some aerated water cases. In that half-reclining position he managed to fire some shots from a revolver at one of the Chinese who was bending down in a manner as if to stab him again. Krishnan heard the sound of gunfire and saw green and red flame on the chest of the Chinese who was bending over the deceased.

Krishnan while witnessing this assault jumped down from the roof and ran to a bus shelter near by